

STATE OF MICHIGAN  
COURT OF APPEALS

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RICHARD A. BREAKIE,

Plaintiff/Counterdefendant-  
Appellee,

v

IVONYX GROUP SERVICES, INC., a Delaware  
Corporation,

Defendant/Counterplaintiff-  
Appellant.

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UNPUBLISHED

March 20, 2003

No. 236004

Wayne Circuit Court

LC No. 00-029056-CK

Before: Markey, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Defendant appeals by right, challenging the trial court's orders denying its motion for summary disposition and to compel arbitration and granting plaintiff's motion for summary disposition in this breach of contract case. We affirm.

Defendant argues that the trial court erred in refusing to compel arbitration of plaintiff's claims. We disagree. The existence of an arbitration agreement and the enforceability of its terms are judicial questions that we review de novo. *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000). The "[i]nterpretation of unambiguous and unequivocal contracts is a question of law." *Massachusetts Indem and Life Ins Co v Thomas*, 206 Mich App 265, 268; 520 NW2d 708 (1994).

It is undisputed that plaintiff's original complaint alleged breach of his employment agreement, which contained an arbitration clause and a choice of law provision, and breach of a promissory note, which was arguably related to the employment agreement. However, plaintiff's three specific claims (failure to pay unused paid time off (PTO), failure to reimburse travel expenses, and failure to pay the promissory note) were the same three claims that plaintiff previously submitted to the wage and hour division of the Michigan Department of Consumer and Industry Services, which the parties settled on June 4, 1999. Because the settlement terms were in writing and signed by defendant's former counsel, they were binding on defendant. See *Michigan Mut Ins Co v Indiana Ins Co*, 247 Mich App 480, 484-485; 637 NW2d 232 (2001); see also MCR 2.507(H). Because defendant settled the claims without demanding arbitration, we agree that the trial court properly denied defendant's motion to compel arbitration of plaintiff's

original complaint. See *Madison Pub Schls v Myers*, 247 Mich App 583, 588-589; 637 NW2d 526 (2001). Furthermore, while the settlement agreement barred plaintiff's original complaint alleging breach of his employment agreement and the related promissory note, plaintiff amended his complaint to assert a breach of the settlement agreement instead.

"An agreement to settle a pending lawsuit is a contract and is to be governed by the legal principles applicable to the construction and interpretation of contracts." *Walbridge Aldinger Co v Walcon Co*, 207 Mich App 566, 571; 525 NW2d 489 (1994). "Where one writing references another instrument for additional contract terms, the two writings should be read together." *Forge v Smith*, 458 Mich 198, 207; 580 NW2d 876 (1998). Where one contract does not rely on another to furnish additional meaning, however, it does not incorporate it by reference. See *id.* at 207-208. In this case, the settlement agreement fails to incorporate the terms of the parties' employment agreement.

Parties cannot be required to arbitrate when they have not agreed to do so. See *Volt Info Sciences, Inc v Board of Trustees of Leland Stanford Jr Univ*, 489 US 468, 478; 109 S Ct 1248; 103 L Ed 2d 488 (1989); see also *Hetrick v Friedman*, 237 Mich App 264, 267; 602 NW2d 603 (1999). Further, where the parties enter into a settlement agreement that does not contain an arbitration clause, the question of whether an agreement to arbitrate exists is for the court. See *Riley Mfg Co, Inc v Anchor Glass Container Corp*, 157 F3d 775, 780-781 (CA 10, 1998). Although the original agreement in *Riley* provided that disputes arising from or relating to it were to be resolved by arbitration, the court found that the parties had not agreed to arbitrate disputes relating to the specific topics listed in the settlement agreement. *Id.* at 780, 782; see also *Knight v Docu-Fax, Inc*, 838 F Supp 1579, 1583-1584 (ND Ga, 1993). In other words, where "the presence and extent of injury under the [s]ettlement [a]greement can be determined without reference to" the parties' original agreement, the dispute does not arise from or relate to the original contract.<sup>1</sup> *Knight, supra* at 1584; see also *Collins v Int'l Dairy Queen*, 169 FRD 690, 694 n 1 (MD Ga, 1997). Thus, the trial court in this case properly decided that any claims arising from the settlement agreement would not be subject to arbitration.

The result is the same even when examining the issue from the standpoint of the parties' original agreement. Under Delaware law, "[a] party cannot be forced to arbitrate the merits of a dispute . . . in the absence of a clear expression of such intent in a valid agreement." *DMS Properties-First, Inc v PW Scott Assocs, Inc*, 748 A2d 389, 391 (Del, 2000). In a case where the arbitration clause in the parties' original agreement covered "all claims or controversies . . . concerning or arising from . . . the construction, performance or breach of this *or any other agreement between us*," it was found to be broad enough to cover disputes arising from the

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<sup>1</sup> In *Knight*, the arbitration clause did not contain language covering disputes "relating to" the original agreement. *Knight, supra*, 838 F Supp at 1583-1584. However, the distinction between "arises from" and "relates to" has been disavowed by the Eleventh Circuit. See *Gregory v Electro-Mechanical Corp*, 83 F3d 382, 386 (CA 11, 1996). Further, the distinction is not relevant where a dispute involving the alleged breach of a settlement agreement can be resolved without reference to the original agreement. *Collins v Int'l Dairy Queen*, 169 FRD 690, 694, n 1 (MD Ga, 1997).

parties' settlement agreement even though it did not contain an arbitration clause. See *Cohen v Smith Barney Inc*, 1997 WL 1737115 (1997, Del Common Pleas), slip op at 2-3 (emphasis in original). We conclude that, even in light of Delaware law, the trial court properly refused to order plaintiff to submit his claims to arbitration.

Defendant next argues that the trial court erred in granting plaintiff's motion for summary disposition. We again disagree. A trial court's grant of summary disposition is reviewed de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994). When reviewing a motion for summary disposition under MCR 2.116(C)(10), the court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

"Absent a showing of factors such as fraud or duress, courts act properly when they enforce [settlement] agreements." *Massachusetts Indem and Life Ins Co*, *supra* at 268. Here, defendant does not allege fraud or duress or any other grounds for abrogating the agreement. As indicated above, settlement agreements are "governed by the legal principles applicable to the construction and interpretation of contracts." *Walbridge*, *supra* at 571.

"The rule in Michigan is that one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform." *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994), quoting *Flamm v Scherer*, 40 Mich App 1, 8-9; 198 NW2d 702 (1972). "However, that rule only applies when the initial breach is substantial." *Michaels*, *supra*. Where there is a question of fact concerning whether a party committed a material breach, summary disposition is inappropriate. *Id.* at 651.

The parties' settlement agreement provides that in exchange for defendant's promise to pay the disputed claims, plaintiff agreed to withdraw his wage and hour claim and to first address any future disputes informally. Defendant argues that plaintiff breached the agreement by filing suit in August 1999, instead of first informally addressing its failure to pay. However, it is undisputed that plaintiff promptly dismissed that lawsuit and then attempted to resolve his dispute with defendant informally, writing two letters requesting payment before eventually commencing the present action in September 2000. We agree with the trial court that defendant was not deprived of the benefit of its bargain by plaintiff's first lawsuit because it was dismissed promptly and because plaintiff did not re-file his claims with the wage and hour division, which, as noted by the trial court, could have subjected defendant to steep penalties in addition to ordinary contract damages. See MCL 408.488; see also MCL 408.484, MCL 408.485 and MCL 408.486. Thus, defendant has failed to show that a question of fact existed concerning whether plaintiff's alleged first breach was material and thereby excused defendant's subsequent failure to perform.

Plaintiff argues that defendant committed the first material breach by not beginning to make payments immediately after the wage and hour claims were settled. However, the settlement agreement does not state exactly when the payments would commence. Thus, there would be a question of fact concerning whether defendant breached the agreement by not beginning to pay until after plaintiff withdrew his wage and hour claim.

Nonetheless, it is undisputed that defendant stopped making PTO payments when plaintiff filed his first lawsuit and never resumed making them. We agree, therefore, that there is no question of fact that defendant's failure to make further PTO payments was a material breach. Further, it is also undisputed that defendant never paid *anything* toward either the unreimbursed travel expenses or the amount owed on the promissory note. As noted by the trial court, the agreement states that these obligations "will be paid as other like liabilities of [defendant], but in any case as soon as funds are available to pay these balances." Defendant alleges that it never paid other like liabilities, but does not allege that there were no funds available at any time after August 1999. Thus, we agree with the trial court that defendant failed to show a question of fact concerning whether its failure to pay was a material breach. Accordingly, the trial court properly granted plaintiff's motion for summary disposition.

We affirm.

/s/ Jane E. Markey

/s/ Michael R. Smolenski

/s/ Patrick M. Meter